

California Regional Water Quality Control Board
Santa Ana Region

December 3, 2002

ITEM: 9

SUBJECT: Resolution Authorizing the Executive Officer to Enter into a Memorandum of Agreement (MOA) with the City of Newport Beach for the Creation and Management of the Robinson-Skinner Annuity Account for Maintenance Dredging and TMDL Compliance Projects in Newport Bay-Resolution No. R8-2002-0054

DISCUSSION:

On April 26, 2002, the Santa Ana Regional Water Quality Control Board (Regional Board) adopted Resolution No. R8-2002-0047 requesting the State Water Resources Control Board (SWRCB) to allocate \$3,800,000 from the Cleanup and Abatement Account (CAA) Fund to be deposited into an annuity account. The annuity account will be managed by the City of Newport Beach and the funds generated will be used by the City for maintenance dredging/restoration of the sediment basins in Newport Bay and for other TMDL compliance activities.

In response to the Regional Board's request, on August 15, 2002, the SWRCB adopted Resolution No. 2002-0144 approving \$3,854,000 in CAA funds. The proposed MOA establishes a mechanism for the transfer and management of this CAA fund. The funds generated from the annuity account will be used for periodic maintenance dredging in Newport Bay to alleviate a serious public health threat from microbial pollution, toxicity, and sedimentation in Newport Bay waters.

Resolution No. R8-2002-0054 authorizes the Executive Officer to enter into a MOA (Attachment A to the Resolution) with the City of Newport Beach that establishes conditions for the creation, management, and disbursement of the annuity account. The MOA also includes provisions for the principal to be returned to the CAA in the event maintenance dredging is no longer needed in the Bay. The funds generated from the annuity account may be used for other TMDL compliance projects in Newport Bay, if both the City and the Regional Board agree. The MOA is modeled after the MOA between the Coastal Conservancy and the San Elijo Lagoon Conservancy, which was established for similar maintenance dredging, in perpetuity, in San Elijo Lagoon in San Diego County.

RECOMMENDATION:

Adopt Resolution No. R8-2002-0054

California Regional Water Quality Control Board
Santa Ana Region

RESOLUTION NO. R8-2002-0054

Tentative

Resolution Authorizing the Executive Officer to Enter into a Memorandum of Agreement with the City of Newport Beach for the Creation and Management of the Robinson-Skinner Newport Bay Account for Maintenance Dredging and TMDL Compliance Projects in Newport Beach

WHEREAS:

1. Section 13440-43 of the California Water Code established the State Water Pollution Cleanup and Abatement Account (CAA) to be administered by the State Water Resources Control Board (State Board).
2. Grants to public agencies and the Regional Boards are available from the CAA. The State Board may order that funds be paid from the CAA to a public agency or the Regional Board to assist cleaning up a waste, or abating its effects, on waters of the State.
3. On April 26, 2002, the Santa Ana Regional Water Quality Control Board (Regional Board) adopted Resolution No. R8-2002-0047 requesting the State Board to allocate \$3,800,000 from the CAA Fund to be deposited into an appropriate interest-bearing Account. The Account will be managed by the City of Newport Beach and the interest generated will be used by the City for maintenance dredging/restoration of the sediment basins in Newport Bay and for other TMDL compliance activities.
4. On August 15, 2002, the SWRCB adopted Resolution No. 2002-0144 approving funding from the Cleanup and Abatement Account in the amount of \$3,854,000 for periodic maintenance dredging to alleviate a serious public health threat from microbial pollution, toxicity, and sedimentation in Newport Bay waters.
5. The attached Memorandum of Agreement (MOA, Attachment "A") between the Regional Board and the City of Newport Beach establishes conditions for the creation, management, and disbursement of the Account for funding periodic maintenance dredging. The interest generated from the Account may be used for other TMDL compliance projects in Newport Bay, if both the City and the Regional Board agree to an amendment to the MOA. The MOA also includes provisions for the principal to be returned to the CAA in the event maintenance dredging is no longer needed in the Bay.

6. After notice to all interested parties, this Regional Board conducted a public hearing on December 3, 2002 to consider all evidence introduced at and prior to the hearing with regard to the MOA for the Newport Bay maintenance dredging and TMDL compliance fund.

THEREFORE, BE IT RESOLVED THAT:

1. The Executive Officer is hereby authorized to enter into the Memorandum of Agreement attached to this Resolution as Attachment "A".
2. Once the Memorandum of Agreement is fully executed by all parties, the Executive Officer shall request the State Board to transfer \$3,854,000 to the Account established pursuant to the Memorandum of Agreement.

I, Gerard J. Thibeault, Executive Officer, do hereby certify that the foregoing is a full, true, and correct copy of a resolution adopted by the California Regional Water Quality Control Board, Santa Ana Region, on December 3, 2002.

Gerard J. Thibeault
Executive Officer

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SANTA ANA REGION**

**MEMORANDUM OF AGREEMENT
WITH THE
CITY OF NEWPORT BEACH
FOR THE CREATION AND MANAGEMENT
OF THE ROBINSON-SKINNER NEWPORT BEACH ACCOUNT

FOR MAINTENANCE DREDGING AND TMDL COMPLIANCE
PROJECTS IN NEWPORT BAY**

Tentative

SCOPE OF AGREEMENT

Pursuant to Section 13440-43 of the California Water Code, the State Water Resources Control Board ("the State Board"), at the request of the California Regional Water Quality Control Board, Santa Ana Region ("the Regional Board") has agreed to grant to the City of Newport Beach ("the Grantee") a sum not to exceed three million eight hundred fifty four thousand dollars (\$3,854,000). The grant is subject to the terms and conditions of this Memorandum of Agreement ("the Agreement"). The interest from the grant funds shall be used by the Grantee to implement the Newport Bay Maintenance Dredging Plan, and any of the implementation plans for the total maximum daily loads ("TMDLs") adopted by the Regional Board, by undertaking the following project ("the Project") at Newport Bay.

In summary, the Project is to create, establish, and manage an interest-earning account, to be called the Robinson-Skinner Newport Bay Account ("the Account") to pay for periodic maintenance dredging in Newport Bay. Interest generated by the Account will be used to fund the maintenance dredging of Newport Bay in perpetuity. The Project includes periodic dredging of two sediment basins in the Upper Bay and other areas impacted by sediment deposition to comply with the TMDL for sediment adopted by the Regional Board. If the interest generated by the Account exceeds that needed for maintenance dredging, then the Project may also fund other projects to comply with other TMDLs adopted by the Regional Board for Newport Bay and/or for a biological and hydrological monitoring program to assess compliance with the TMDLs.

The Grantee shall carry out the Project in accordance with this Agreement and the work program to be approved by the Executive Officer of the Regional Board (the "Executive Officer") pursuant to this Agreement. The Grantee and other watershed stakeholders shall provide any funds beyond those granted under this Agreement, which are needed to complete the Project.

December 3, 2002

**CONDITIONS PRECEDENT TO COMMENCEMENT OF PROJECT AND
DISBURSEMENT**

The Grantee shall not commence the Project and the Regional and State Board shall not be obligated to disburse any funds under this Agreement unless and until the following conditions precedent have been met:

1. A resolution has been adopted by the City Council of the Grantee authorizing the execution of this Agreement and approving its terms and conditions.
2. The Executive Officer has approved in writing:
 - a. The work program and projected budget for the Project.
 - b. The plans for the erection of signs and placards as provided in the "SIGNS" section of this Agreement.
 - c. The Account Manager proposed by the City for the Account.
3. Written evidence has been provided to the Executive Officer:
 - a. that all permits and approvals necessary for the commencement of the Project under applicable local, state and federal laws and regulations have been obtained.
 - b. That the California Coastal Commission has determined that all activities funded with this Account are consistent with the Coastal Act.
 - c. That the Grantee has provided for liability insurance and an additional-insured endorsement, or is self-insured, as described in the "LIABILITY" section of this Agreement.
4. The Regional Board, the Grantee and, if any portion of the property on which the project will be implemented is not owned by the Grantee, then the owner of that property, have entered into and the Grantee has recorded an agreement to protect the public interest in the improvements or facilities constructed under this grant as required by Public Resources Code Section 31116(c);

December 3, 2002

OTHER PROVISIONS

The following conditions shall also apply to this Agreement:

1. The Grantee shall provide written notice of intended expenditures pursuant to the work program to the Executive Officer for his/her concurrence.
2. The Grantee shall submit an annual report as described in the "ROBINSON-SKINNER ACCOUNT" section of this Agreement.
3. The Grantee shall retain intact the entirety of the principal of the Account. The Grantee shall not expend any sums from the principal of the Account without written approval of the Executive Officer.
4. The Grantee shall not use any portion of the Account to acquire an interest in real property.
5. The Grantee shall not use any portion of the Account for the Upper Newport Bay Ecosystem Restoration Project planned for 2003 through 2005, but may use funds for similar projects subsequent to 2005.

TERM OF AGREEMENT

This Agreement shall be deemed executed and effective when signed by both parties and received in the offices of the Regional Board together with the resolution described in the "CONDITIONS PRECEDENT TO COMMENCEMENT OF PROJECT AND DISBURSEMENT" section of this Agreement. An authorized representative of the Grantee shall sign the signature page of the originals of this Agreement in ink.

This Agreement shall run from its effective date through perpetuity (the "termination date") unless otherwise terminated or amended as provided by the Agreement. In the event that the Project described herein is completed, or is no longer needed, the Grantee shall return any remaining principal to the State Water Resources Control Board's Cleanup and Abatement Account. Otherwise, this Agreement shall be terminated when all funds in the Account have been expended.

AUTHORIZATION

The signature of the Executive Officer on this Agreement certifies that at its December 3, 2002 meeting, the Regional Board adopted Resolution No. R8-2002-0054,

December 3, 2002

authorizing the Executive Officer to enter into this Agreement. This Agreement is executed pursuant to that authorization.

ROBINSON-SKINNER NEWPORT BAY ACCOUNT

Grantee shall establish an Account for the purpose of receiving, managing and disbursing the funds in accordance with the terms and conditions of this Agreement. Grantee shall submit for the review and approval of the Executive Officer the entity selected by Grantee to act as the Account Manager for the Account. The Executive Officer shall have authority to unilaterally require removal of the Account Manager if at any time he/she determines that the Account Manager is not performing its duties in a manner consistent with this Agreement and the purposes of the Account and the Project. If the office of the Account Manager becomes vacant, Grantee shall submit a replacement Account Manager for the review and approval of the Executive Officer. The Grantee and the Account Manager shall observe the following minimum procedural requirements in the maintenance of the Account:

1. The Account Manager shall maintain the Account funds in a segregated account separate from all other Grantee accounts, if any;
2. All funds held in the Account shall be invested :
 - a. In full accordance with Grantee's investment policy (described in Newport Beach Council Policy F-1 or its successor policy); and
 - b. Subject to the written approval of the Executive Officer; or, in the absence of specific instructions,
 - c. In U.S. Treasury Bills and notes.
3. Interest and earnings accruing to the Account shall be reinvested in the Account and used to carry out the purposes of this Agreement;
4. The Account Manager shall be authorized and obligated to make disbursements of interest only, unless otherwise instructed by Grantee after Grantee has received written approval of the Executive Officer;
5. Information regarding the Account Manager shall be submitted to the Executive Officer in writing, including the name, mailing address, and phone number. The Grantee shall not change the Account Manager without prior written approval of the Executive Officer; and
6. The Account Manager shall submit to the Grantee and the Executive Officer an annual report by December 15 of each year, which itemizes all funds maintained, deposited, accrued and disbursed from the Account and a summary of the investment portfolio, which highlights changes in the portfolio over the past year.

December 3, 2002

Grantee shall submit an annual report to the Executive Officer which includes a projected budget for the following twelve-month period and which summarizes the project. Grantee shall not spend principal from the Account without the written approval of the Executive Officer and shall not spend income or principal from the Account for purposes other than the Project described above.

Standard Provisions

WORK PROGRAM

Prior to dispersal of funds, the Grantee shall submit a detailed work program to the Executive Officer for review and written approval consistent with this Agreement. The work program shall include:

1. The name, qualifications and experience of the proposed Account Manager for the Account.
2. A comprehensive list of activities and expenses that may be funded through the Account, including administrative costs.
3. Projected Project budget for the next 12 months.

The work program shall have the same force and effect as if included in the text of this Agreement. However, the work program may be modified without amendment of this Agreement upon the Grantee's submission of a modified work program and the Executive Officer's written approval. If this Agreement and the work program are inconsistent, the Agreement shall control.

The Grantee shall carry out the Project in accordance with the approved work program.

BONDING

If the Grantee intends to use any contractor(s) on any portion of the project to be funded under this agreement, construction shall not begin until each such contractor has furnished a performance bond in favor of the Regional Board and the Grantee, in the following amounts: for faithful performance, one hundred percent (100%) of the contract value; and for labor and materials, one hundred percent (100%) of the contract value. This requirement shall not apply to any contract for less than \$20,000.

SIGNS

December 3, 2002

The Grantee shall erect signs acknowledging State Board's and Regional Board's assistance and displaying the Boards' respective logo, unless the Grantee incorporates this acknowledgement into other signage in a manner approved by the Executive Officer.

COSTS AND DISBURSEMENTS

Upon determination by the Executive Officer that all "CONDITIONS PRECEDENT TO COMMENCEMENT OF PROJECT AND DISBURSEMENT" have been fully met, the Regional Board shall recommend that the State Board disburse to the Grantee the total amount of this grant for deposit in the Account.

The Grantee shall request disbursement by filing with the State Board a fully executed "Request for Disbursement" form (available from the Regional Board). The Grantee shall include in the form its name and address, the number for the resolutions adopted by the City and the Regional Board in support of this Agreement, the date of the submission, the amount of the request, and a description of the project for which disbursement is requested. An authorized representative of the Grantee shall sign the form. Failure to fully execute and submit a Request for Disbursement form will relieve the State Board of its obligation to disburse funds to the Grantee unless and until all deficiencies in the form are rectified.

EARLY TERMINATION AND FAILURE TO PERFORM

Prior to the disbursement of funds to the Grantee, either party may terminate this Agreement for any reason by providing the other party with seven days notice in writing. Following the disbursement of funds to the Grantee, the Grantee may terminate this Agreement for any reason by providing the Regional Board with seven days notice in writing. If the Grantee terminates this Agreement, the Grantee shall be liable for immediate repayment of all amounts disbursed by the Regional Board/State Board under this Agreement less the amount of principal expended by the Grantee with the written approval of the Executive Officer.

If the Regional Board terminates the Agreement prior to the disbursement of funds to the Grantee, the Regional Board shall not be responsible for any obligations incurred by the Grantee.

If the Grantee fails to undertake the project in accordance with this Agreement, or fails to fulfill any other obligations of this Agreement prior to the termination date, the Grantee shall be liable for immediate repayment to the Regional Board/State Board of

December 3, 2002

all amounts disbursed by the Regional Board/State Board under this Agreement. The State Board may, at its sole discretion, consider extenuating circumstances and not require repayment for work partially completed. This paragraph shall not be deemed to limit any other remedies the Regional Board or the State Board may have for breach of this Agreement.

INSPECTION

Throughout the term of the agreement, the State Board and the Regional Board shall have the right to inspect the Project area to ascertain compliance with this Agreement.

LIABILITY

The Grantee shall be responsible for, indemnify and save harmless the State and Regional Boards, its officers, agents and employees from any and all liabilities, claims, demands, damage or costs resulting from, growing out of, or in any way connected with or incident to this Agreement, except for active negligence of the boards, its officers, agents or employees. The duty of the Grantee to indemnify and save harmless includes the duty to defend as set forth in Civil Code Section 2778.

The Grantee waives any and all rights to any type of express or implied indemnity or right of contribution from the State, its officers, agents or employees, for any liability resulting from, growing out of, or in any way connected with or incident to this Agreement.

Throughout the term of this Agreement, the Grantee shall provide and maintain public-liability and property-damage insurance for liability assumed by the Grantee under this Agreement with minimum limits of liability as follows:

A single limit for bodily injury (including death) and property damage liability combined of \$1,000,000 each occurrence and \$1,000,000 in the aggregate.

This insurance shall be issued by a company or companies admitted to transact business in the State of California. The liability insurance policy shall contain an endorsement specifying that:

- (a) The State of California, its officers, agents and employees are included as additional insureds for any liability resulting from, growing out of, or in any way connected with or incident to this Agreement; and

December 3, 2002

- (b) The policy will not be cancelled or reduced in coverage without thirty days' prior written notice to the Regional Board.

The State and Regional Boards are not responsible for premiums and assessments on the insurance policy.

Nothing in this Agreement is intended to create in the public or in any member of it rights as a third party beneficiary under this Agreement.

AUDITS/ACCOUNTING/RECORDS

The Grantee shall maintain standard financial accounts, documents, and records relating to the implementation of the project. The Grantee shall retain these documents for three years throughout the term of this Agreement. The documents shall be subject to examination and audit by the State and Regional Boards and the Bureau of State Audits during this period. The Grantee may use any accounting system which follows the guidelines of "Generally Accepted Accounting Practices" published by the American Institute of Certified Public Accountants.

NONDISCRIMINATION

During the performance of this Agreement, the Grantee and its contractors shall not unlawfully discriminate against, harass, or allow harassment against any employee or applicant for employment because of sex, race, religion, color, national origin, ancestry, disability, medical condition, marital status, age (over 40) or denial of family-care leave, medical-care leave, or pregnancy-disability leave. The Grantee and its contractors shall ensure that the evaluation and treatment of their employees and applicants for employment are free of such discrimination and harassment. The Grantee and its contractors shall comply with the provisions of the Fair Employment and Housing Act (Government Code Section 12900 et seq.) and the applicable regulations (California Code of Regulations, Title 2, Section 7285.0 et seq.). The regulations of the Fair Employment and Housing Commission regarding Contractor Nondiscrimination and Compliance (Chapter 5 of Division 4 of Title 2 of the California Code of Regulations) are incorporated into this Agreement. The Grantee and its contractors shall give written notice of their obligations under this clause to labor organizations with which they have a collective bargaining or other agreement. This nondiscrimination clause shall be included in all contracts and subcontracts entered into to perform work provided for under this Agreement.

December 3, 2002

INDEPENDENT CAPACITY

The Grantee, and the agents and employees of Grantee, in the performance of this Agreement, shall act in an independent capacity and not as officers or employees or agents of the State of California.

ASSIGNMENT

Without the written consent of the Executive Officer, this Agreement is not assignable by the Grantee in whole or in part.

TIMELINESS

Time is of the essence in this Agreement.

EXECUTIVE OFFICER'S DESIGNEE

The Executive Officer shall designate a Regional Board project manager who shall have authority to act on behalf of the Executive Officer with respect to this Agreement. The Executive Officer shall notify the Grantee of the designation in writing.

AMENDMENT

As expressly provided in this Agreement, no change in this Agreement shall be valid unless made in writing and signed by the parties to the Agreement. No oral understanding or agreement not incorporated in this Agreement shall be binding on any of the parties.

LOCUS

This Agreement is deemed to be entered into in the County of Orange.

By_____

Executive Officer

By_____

Mayor

MOA, Resolution No. R8-2002-0054 Page 10 of 10
City of Newport Beach
Robinson-Skinner Newport Bay Account

December 3, 2002

California Regional Water Quality Control Board,
Santa Ana Region

City of Newport Beach

Date:_____

Date:_____